

ATTACHMENT “A”

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45 IN THE UNITED STATES DISTRICT COURT
6 FOR THE NORTHERN DISTRICT OF CALIFORNIA
7

8 CLAYTON HARMSTON, et al.,

No. C 07-01186 SI

9 v. Plaintiffs,
1011 CITY AND COUNTY OF SAN FRANCISCO, et
al.,12 Defendants.
13**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR JUDGMENT ON THE
PLEADINGS, DENYING PLAINTIFFS'
MOTION FOR LEAVE TO AMEND
COMPLAINT, AND GRANTING
DEFENDANTS' REQUEST FOR
JUDICIAL NOTICE**14
15 On September 21, 2007, the Court heard argument on defendants' motion for judgment on the
16 pleadings and plaintiffs' motion for leave to amend their complaint. Having considered the arguments
17 of counsel and the papers submitted, the Court hereby GRANTS in part and DENIES in part defendants'
18 motion for judgment on the pleadings and DENIES plaintiffs' motion for leave to amend their
19 complaint. The Court also GRANTS defendants' request for judicial notice and DENIES as moot
20 plaintiffs' request for judicial notice.
21

22

23 **BACKGROUND**24 Plaintiffs are eighteen police officers employed by the San Francisco Police Department. Each
25 officer was involved in some way in the making of a video that was meant to parody the work of police
26 officers assigned to the Bayview-Hunter's Point District. First Amended Complaint ¶ 26. In December
27 2005, shortly after it was made, the video came to the attention of San Francisco Police Chief Heather
28 Fong and San Francisco Mayor Gavin Newsom, who believed the video contained racist, sexist, and

1 homophobic scenes. *Id.* at ¶¶ 28, 29. Newsom and Fong appeared before the press to condemn the
2 video, and Fong temporarily suspended some, but apparently not all, of the police officers involved in
3 making the video. *Id.* at ¶ 29. The City and Fong also launched an investigation into the video
4 sometime after it was discovered by Fong. *Id.* at ¶ 32. That investigation concluded in December 2006,
5 at which point certain plaintiffs were given additional suspensions as well as other forms of reprimand.
6 *Id.* at ¶¶ 40-42.

7 Plaintiffs identify themselves as being white, African American, and Latino, but no plaintiff
8 identifies as being Asian American. *Id.* at ¶ 25. Plaintiffs allege that the City and Fong disciplined only
9 those officers involved in the video who were not Asian American, and failed to discipline Asian-
10 American police officers who were involved in making the video. *Id.* at ¶¶ 28, 30, 43-46, 48, 54.
11 Plaintiffs allege that the temporary suspensions of the officers violated the San Francisco Charter and
12 department regulations. *Id.* at ¶ 29. Plaintiffs also allege that after plaintiffs filed notices of tort claims
13 against the defendants, on May 31, 2006, the City and Fong retaliated against some of the plaintiffs by
14 giving them undesirable positions and undesirable hours, and also by requiring some plaintiffs to appear
15 before the police commissioner to answer charges against them. *Id.* at ¶¶ 62-64.

16 Plaintiffs originally brought the instant suit in state court in August, 2006. They amended their
17 complaint in February 2007, whereupon defendants removed the suit to federal court. Plaintiffs' First
18 Amended Complaint includes claims for (1) racial discrimination under state law, (2) racial
19 discrimination under Title VII, (3) retaliation under state law, (4) retaliation under Title VII, (5)
20 defamation, and (6) intentional infliction of emotional distress.

21 After removal to federal court, plaintiffs filed two motions for leave amend: on June 8, 2007,
22 plaintiffs sought leave to add a state law claim of defamation against Mayor Gavin Newsom; six weeks
23 later, on July 24, 2007, plaintiffs sought leave to add a claim for a violation of due process under
24 U.S.C. § 1983.

25 In between the two motions to amend, defendants City and Fong filed a motion for judgment on
26 the pleadings as to the First Amended Complaint. Defendants seek to dismiss the claims of retaliation
27 (under state law), defamation, and intentional infliction of emotional distress against Fong on various
28 grounds of immunity under California law. Defendants also seek to dismiss the Title VII claim of

1 retaliation against Fong because Title VII does not contemplate individual liability. Finally, defendants
2 seek to dismiss the claims of defamation and intentional infliction of emotional distress against the City
3 based on Fong's immunity from suit on the same claims.

4 Defendants' motion for judgment on the pleadings and both of plaintiffs' motions to amend are
5 now before the Court.

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LEGAL STANDARD

8 "After the pleadings are closed but within such time as not to delay the trial, any party may move
9 for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Judgment on the pleadings is proper when the
10 moving party clearly establishes on the face of the pleadings that no material issue of fact remains to
11 be resolved and that it is entitled to judgment as a matter of law." *Hal Roach Studios, Inc. v. Richard*
12 *Feiner & Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1989) (citation omitted). "For purposes of the motion,
13 the allegations of the non-moving party must be accepted as true, while the allegations of the moving
14 party which have been denied are assumed to be false." *Id.* (citation omitted).

15 Although Rule 12(c) neither specifically authorizes nor prohibits motions for judgment on the
16 pleadings "directed to less than the entire complaint or answer . . . [i]t is the practice of many judges to
17 permit 'partial' judgment on the pleadings (e.g., on the first claim for relief, or the third affirmative
18 defense)." See William W. Schwarzer, A. Wallace Tashima & James M. Wagstaffe, *Federal Civil*
19 *Procedure Before Trial* 9:340 (2004). "[C]ourts have discretion to grant a Rule 12(c) motion with leave
20 to amend." *Id.* at 9:341.

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DISCUSSION

1. Motion for judgment on the pleadings

A. Individual employee liability under Title VII

25 Defendants argue that plaintiffs' fourth cause of action – a federal law claim of retaliation under
26 Title VII – fails to state a claim against Fong because individuals are not liable for retaliation under Title
27 VII. Plaintiffs do not argue otherwise. The Ninth Circuit has held that "individual defendants cannot
28 be held liable for damages under Title VII." *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir.

1 1993). The Court agrees with defendants that plaintiffs' cause of action for retaliation under Title VII
2 fails to state a claim against Fong and any other individual employees of the City. Accordingly, the
3 Court GRANTS defendants' motion for judgment on the pleadings with respect to the fourth cause of
4 action against Fong; plaintiffs' fourth cause of action may be brought only against the City itself.
5

6 **B. Immunity**

7 Defendants assert that plaintiffs' third, fifth, and sixth causes of action must be dismissed against
8 Fong because she is immune from liability under Government Codes §§ 820.2 and 821.6 and Civil Code
9 § 47(a).

10 California Government Code § 820.2 states, "a public employee is not liable for an injury
11 resulting from his act or omission where the act or omission was the result of the exercise of the
12 discretion vested in him, whether or not such discretion be abused." Cal. Gov't Code § 820.2. The
13 discretionary act immunity extends to basic governmental policy decisions entrusted to broad official
14 judgment. *Caldwell v. Montoya*, 10 Cal. 4th 972, 976 (Cal. 1995). Because "almost all acts involve
15 some choice among alternatives, and the statutory immunity thus cannot depend upon a literal or
16 semantic parsing of the word 'discretion,'" California courts distinguish between an employee's
17 ministerial and policy decisions in determining whether the decision was discretionary. *Caldwell*, 10
18 Cal. 4th at 981. Ministerial decisions are those that involve the "operational" functions of government,
19 whereas policy decisions are those that involve the "planning" . . . functions of government." *Id.*
20 Immunity is reserved for basic policy decisions which have been expressly committed to coordinate
21 branches of government, "areas of quasi-legislative policy-making [which] are sufficiently sensitive"
22 to call for judicial abstention." *Id.* (quoting *Johnson v. California*, 69 Cal. 2d 782, 794 (1968)). In
23 contrast, there is no immunity for ministerial decisions that "merely implement a basic policy already
24 formulated." *Id.* Additionally, this immunity "cannot be abrogated by a statute which simply imposes
25 a general legal duty or liability" on public employees, but only by a statute with a "clear indication of
26 legislative intent that statutory *immunity* is *withheld or withdrawn* in the particular case." *Id.* at 986
27 (italics in original).

28 Government Code § 821.6 states, "[a] public employee is not liable for injury caused by his

1 instituting or prosecuting any judicial or administrative proceeding within the scope of his employment,
2 even if he acts maliciously and without probable cause.” Cal. Gov’t Code § 821.6. A supervisor’s
3 conducting of an investigation and initiating formal disciplinary proceedings against a public employee
4 fall within the scope of an “administrative proceeding” and are immune from liability. *See Kemmerer*
5 *v. County of Fresno*, 200 Cal. App. 3d 1426, 1436-37 (Cal. Ct. App. 1988). This immunity also applies
6 to a public employee’s statements relating to an investigation or proceeding, as long as there is “a causal
7 relationship between the publication and the prosecution process.” *Ingram v. Flippo*, 74 Cal. App. 4th
8 1280, 1292-93 (Cal. Ct. App. 1999) (citing *Cappuccio, Inc. v. Harmon*, 208 Cal. App. 3d 1496, 1499
9 (Cal. Ct. App. 1989)).

10 Civil Code § 47(a) states that “[a] privileged publication or broadcast is one made: (a) In the
11 proper discharge of an official duty.” Cal. Civ. Code § 47(a). This privilege applies to any
12 communication made by a “qualifying executive officer,” including a city or county officer, *Copp v.*
13 *Paxton*, 45 Cal. App. 4th 829, 843 (Cal. Ct. App. 1996) (applying § 47(a) to the head of a county
14 department); *Tutor-Saliba Corp. v. Herrera*, 136 Cal. App. 4th 604, 614-15 (Cal. Ct. App. 2006)
15 (applying § 47(a) to San Francisco’s city attorney), acting within the scope of his or her official duties
16 and “while exercising policy-making functions,” *Copp*, 45 Cal. App. 4th at 843 (quoting *Royer v.*
17 *Steinberg*, 90 Cal. App. 3d 490, 501 (Cal. Ct. App. 1979)). There is some question whether this policy-
18 making requirement tracks the policy-making requirement of Government Code § 820.2, discussed
19 above, or whether it applies more broadly to “encompass all discretionary acts essential to the proper
20 exercise of an executive function.” *Id.* at 844.

21

22 **(1) Third cause of action**

23 Plaintiffs’ third cause of action claims that the City and Fong retaliated against plaintiffs in
24 violation of California Government Code § 12940 in two ways: by transferring plaintiffs Evanson,
25 Parry, and Harmston to less desirable positions with less desirable hours, after they filed race
26 discrimination claims against defendants; and by sending letters of reprimand to plaintiffs Cohen,
27 Hurley, Lewis, Parry, and Harmston, requiring them to appear before the police commissioner to answer
28 various charges.

1 Defendants argue that Fong is immune from liability under Government Code § 820.2 for any
2 disciplinary actions because such actions are discretionary. However, based solely on the pleadings to
3 date, which the Court must presently accept as true, the Court cannot make such a finding. The decision
4 to move police officers to new positions with new hours, as well as the decision to order officers to
5 answer various charges, are generally operational decisions that do not implicate the policymaking and
6 planning functions of the police department. *Taylor v. City of L.A. Dep't of Water and Power*, 144 Cal.
7 App. 4th 1216, 1239 (Cal. Ct. App. 2006) (characterizing similar decisions as “routine duties incident
8 to the normal operations of the employee’s office or position” (internal quotation marks omitted)). As
9 the California Court of Appeal has explained, “decisions regarding job assignments, training and
10 promotion may not be characterized as a quasi-legislative policy-making [decision which] is sufficiently
11 sensitive to call for judicial abstention” *Id.* (internal quotation marks omitted) (alteration in
12 original). *See also Corales v. Bennett*, 488 F. Supp. 2d 975, 990 (C.D. Cal. 2007) (denying immunity
13 under Government Code § 820.2 to a principal engaged in school discipline).

14 Defendants rely on *Caldwell*, in which the California Supreme Court held that school board
15 members were immune from liability stemming from their termination of a school superintendent for
16 discriminatory and retaliatory reasons. *Caldwell*, 10 Cal. 4th at 976-977, 989. There, however, the
17 court relied on the importance of a school superintendent, “the [school] district’s foremost appointed
18 official” who occupies a “crucial post” which has “fundamental policy implications.” *Id.* at 983. The
19 court also relied in part on “a state statute that gave the school board authority over the superintendent’s
20 employment,” indicating that the decision was “expressly entrusted to a coordinate branch of
21 government at its highest level.” *McQuirk v. Donnelley*, 189 F.3d 793, 800 (9th Cir. 1999) (citing
22 *Caldwell*, 10 Cal. 4th at 982) (internal quotation marks omitted). Here, by contrast, the parties have not
23 pointed to similar governing statutes, and the plaintiff police officers do not hold the same high-level
24 positions of authority as the school superintendent in *Caldwell*. *See also Chapin v. Aguirre*, 2007 WL
25 1660740 *6 (S.D. Cal. June 7, 2007) (plaintiff trial attorneys did not play a role in formulating policy,
26 and thus did not occupy the same “crucial post” as a school superintendent).

27 Defendants also rely on cases – see *Lipman v. Brisbane Elementary School District*, 55 Cal. 2d
28 224 (1961), and *Hopper v. Allen*, 266 Cal. App. 2d 797 (Cal. Ct. App. 1968) – that predate the seminal

1 case of *Johnson v. California*, in which the California Supreme Court rejected a literal interpretation of
2 the word “discretionary,” *see McQuirk*, 189 F.3d at 798-99. As such, they are no longer reliable
3 indicators of California law. *See Sanborn v. Chronicle Publ’g Co.*, 18 Cal. 3d 406, 414-15 (1976).
4 Similarly, the case of *Kemmerer*, 200 Cal. App. 3d 1426, employs an incorrect definition of
5 “discretionary” actions and relies on cases predating *Johnson*, *see Chapin*, 2007 WL 1660740 at *7
6 (dismissing *Kemmerer* on similar grounds). The case of *Eldridge v. Sierra View Local Hospital District*,
7 224 Cal. App. 3d 311 (Cal. Ct. App. 1990), in turn relies on *Kemmerer* and does not discuss the meaning
8 of “discretionary” actions. Accordingly, *Taylor* and other cases applying the current definition of
9 “discretionary” carry more weight.

10 The chief of police undoubtedly exercises a great deal of discretion as a result of her position.
11 However, the Court must examine the nature of the particular action at issue, in the context of the
12 decision-maker’s position. *Caldwell*, 10 Cal. 4th at 981 (“The fact that an employee normally engages
13 in discretionary activity is irrelevant if, in a given case, the employee did not render a considered
14 decision.” (internal quotation marks omitted)). Such a nuanced examination cannot be made on the bare
15 pleadings now before the Court. As this case develops, it may become clear that Fong actually was
16 involved in making policy when/if she decided to alter employment conditions and reprimand certain
17 plaintiffs, due to the nature of plaintiffs’ conduct and its impact on the police department and the
18 community at large. It may therefore be necessary to revisit this question of § 820.2 immunity at the
19 summary judgment stage.

20 In the alternative, defendants argue that Government Code § 821.6 immunizes Fong from
21 plaintiffs’ retaliation claim. Defendants refer to the suspension of plaintiffs in December 2005, which
22 may have arisen out of the initial investigation, but these suspensions are not at issue in plaintiffs’ third
23 cause of action. The actions complained of here – transferring plaintiffs Evanson, Parry, and Harmston
24 to less desirable positions with less desirable hours – allegedly occurred in June 2006, prior to the close
25 of the investigation. The actions were not alleged in the complaint to be tied to or a product of the
26 investigation itself, nor do defendants appear to make this claim in their motion papers. Section 821.6
27 applies only to injuries caused by the institution or prosecution of an investigation or proceeding.
28 *Kemmerer*, 200 Cal. App. 3d at 1436-37. Accordingly, absent a further factual showing, the Court

1 cannot extend immunity to Fong for alleged retaliation relating to changes to the employment conditions
2 of certain plaintiffs.

3 Plaintiffs' third cause of action also alleges retaliation based on letters of reprimand sent to
4 plaintiffs Cohen, Hurly, Lewis, Parry, and Harmston after the investigation, letters which required them
5 to "appear before the Police Commissioner to answer various charges as set forth above." First
6 Amended Complaint ¶ 64. In contrast to the change in employment conditions, this action by its very
7 nature was related to the investigation and disciplinary proceedings against the plaintiffs. *See id.* at ¶¶
8 32-38. Accordingly, the Court finds that Fong is immune under § 821.6 from plaintiffs' retaliation claim
9 as it relates to the letters of reprimand discussed in plaintiffs' complaint. *Kemmerer*, 200 Cal. App. 3d
10 at 1436-37.¹

11 Finally, the Court holds that defendants cannot rely on Civil Code § 47(a) to provide immunity
12 to Fong for the alleged retaliation stemming from the June 2006 change in employment conditions.
13 Section 47(a) applies only to a publication or broadcast; what is at issue in the alleged change in
14 positions and hours for the three plaintiffs is not the communication of this change but the change in
15 employment conditions itself.

16 The Court GRANTS defendants' motion for judgment on the pleadings on the third cause of
17 action against Fong, with respect to the letters of reprimand and orders to appear to answer charges. In
18 all other respects, the motion is denied subject to further consideration based on a fuller record.
19

20 **(2) Fifth cause of action**

21 Plaintiffs' fifth cause of action is that the City and Fong defamed the plaintiffs by, among other
22 things, publicizing allegations that plaintiffs are bigots. Defendants contend that Government Code
23 § 820.2 shields Fong from liability stemming from plaintiffs' claim of defamation. The Court agrees.
24 Fong's decision to speak to the press about plaintiffs qualifies as a discretionary, policy-making decision
25

26 ¹Defendants' actions in sending letters of reprimand to certain plaintiffs may be immune under
27 Civil Code § 47(a) if these letters were sent by qualifying executive officers. *Copp*, 45 Cal. App. 4th
28 at 843. It is unclear from the pleadings who sent these letters of reprimand to the five plaintiffs, so the
Court will reserve judgment on this question.

1 because Fong, as Chief of the Police Department, faced a novel and potentially volatile situation that
2 could have had an impact on departmental relations with the community as well as the department's
3 public image. This qualifies as a "sufficiently sensitive" situation in which judicial abstention is
4 necessary under Government Code § 820.2. *See Caldwell*, 10 Cal. 4th at 981 (quoting *Johnson*, 69 Cal.
5 2d at 794). Although it is true, as plaintiffs argue, that the California Supreme Court has held that the
6 decision by a lower-level employee to speak to the press is not a discretionary decision because an
7 employee's "discussions with the public or press regarding the functioning of his office would seem,
8 instead, to fall within the category of those routine, ministerial duties incident to the normal operations
9 of that office," *Sanborn*, 18 Cal. 3d at 415, Fong was not a lower-level employee and the context in
10 which Fong made her decision was by no means "routine" or "incident to the normal operations of" her
11 office, *id.* Rather, Fong's decision to speak to the press was a high-level decision that concerned the
12 way the police department conducted its business. *Cf. McQuirk*, 189 F.3d at 800 (statements about a
13 plaintiff's "reputation and work habits constituted a low-level decision that did not concern the way in
14 which the sheriff's office conducted its business"). The Court also agrees with defendants that Fong
15 is immune from liability under Government Code § 821.6 because Fong made the allegedly defamatory
16 statements while announcing plaintiffs' temporary suspensions and in connection with launching an
17 investigation into plaintiffs' conduct. Such statements relating to an investigation of misconduct are
18 protected by § 821.6, regardless of Fong's motivations or the presence of probable cause. *Ingram*, 74
19 Cal. App. 4th at 1292-93; *Citizens Capital Corp. v. Spohn*, 133 Cal. App. 3d 887, 889 (Cal. Ct. App.
20 1982).

21 Because Government Codes §§ 820.2 and 821.6 immunize Fong from plaintiffs' defamation
22 claim, the Court need not reach defendants' assertion that Civil Code § 47(a) also provides immunity
23 from this cause of action. The Court GRANTS defendants' motion to dismiss the fifth cause of action
24 against Fong on the basis of immunity under Government Codes §§ 820.2 and 821.6.
25

26 **(3) Sixth Cause of Action**

27 Plaintiffs' sixth cause of action alleges intentional infliction of emotional distress, evidently
28 based on the alleged defamation, retaliation and discrimination. Defendants assert that Fong is immune

1 from this claim under Government Codes §§ 820.2 and 821.6 and Civil Code § 47(a). Because the sixth
2 cause of action is based on plaintiffs' claims of retaliation and defamation, Fong's immunity from
3 liability for this claim necessarily tracks her immunity in the third and fifth causes of action. The Court
4 finds that Fong is immune, under § 821.6, from liability for intentional infliction of emotional distress
5 related to the letters of reprimand sent to five of the plaintiffs, but not immune, at this time, from
6 liability for intentional infliction of emotional distress related to the change in employment conditions
7 for plaintiffs Evanson, Parry, and Harmston. Fong is also immune, under §§ 820.2 and 821.6, from
8 claims of intentional infliction of emotional distress based on the allegedly defamatory statements, as
9 Fong's decision to speak to the press was discretionary and these statements were made at the start of
10 an investigation into misconduct by the plaintiffs.

11 Defendants do not contend that Fong is immune from a claim of intentional infliction of
12 emotional distress based on the allegations of racial discrimination.

13 The Court GRANTS defendants' motion to dismiss the sixth cause of action against Fong, with
14 respect to the letters of reprimand and defamation. In all other respects, the motion is denied subject
15 to further consideration based on a fuller record.

16

17 **C. Public entity liability regarding the Fifth and Sixth Causes of Action**

18 In general, in California “[a] public entity is not liable for an injury.” Cal. Gov’t Code § 815(a).
19 California law provides that there are two avenues by which a public entity, such as the City of San
20 Francisco, may be liable for an injury. The first avenue is where a statute provides for liability by
21 creating a mandatory duty. *Id.* §§ 815 & 815.6; *Forbes v. County of San Bernardino*, 101 Cal. App. 4th
22 48, 53 (Cal. Ct. App. 2002). “An enactment creates a mandatory duty if it requires a public agency to
23 take a particular action.” *County of L.A. v. Superior Court*, 102 Cal. App. 4th 627, 639 (Cal. Ct. App.
24 2002). A “litigant seeking to plead the breach of a mandatory duty must specifically allege the
25 applicable statute or regulation.” *Id.* at 638 (internal quotation marks omitted).

26 The second avenue by which a public entity may be liable for an injury is where an employee
27 of the entity would be liable for the injury: “[a] public entity is liable for injury proximately caused by
28 an act or omission of an employee of the public entity within the scope of his employment if the act or

1 omission would . . . have given rise to a cause of action against that employee or his personal
2 representative." Cal. Gov't Code § 815.2(a). This derivative liability does not apply, however, where
3 "the employee is immune from liability." *Id.* § 815.2(b). That is, "public entities are immune [from
4 vicarious liability] where their employees are immune, except as otherwise provided by statute."
5 *Caldwell*, 10 Cal. 4th at 980.

6 Defendants argue that plaintiffs' fifth and sixth causes of action fail to state a claim against the
7 City because both of these avenues of liability against the City are closed. Plaintiffs do not seriously
8 respond to this assertion. With respect to a mandatory duty imposed by statute, plaintiffs have failed
9 to specifically allege any applicable statute that makes the City directly liable for the injuries of
10 defamation or intentional infliction of emotional distress; as a result, the City cannot be held directly
11 liable under plaintiffs' fifth or sixth causes of action. *County of L.A.*, 102 Cal. App. 4th at 638. The
12 City also cannot be held vicariously liable for defamation under the fifth cause of action because Fong
13 is immune from liability for these statements under Government Codes §§ 820.2 and 821.6. As for
14 plaintiffs' sixth cause of action, the City is not liable for intentional infliction of emotional distress
15 stemming from the alleged defamation and from the letters of reprimand sent to five plaintiffs because
16 Fong is immune from liability arising out of these actions under Government Codes §§ 820.2 and 821.6.
17 The City remains potentially liable, through Fong, for intentional infliction of emotional distress
18 stemming from alleged racial discrimination and retaliation in the form of changes to the positions and
19 working hours of Evanson, Parry, and Harmston. Cal. Gov't Code § 815.2(a). Accordingly, the Court
20 GRANTS defendants' motion to dismiss the fifth cause of action against the City and GRANTS
21 defendants' motion to dismiss the sixth cause of action against the City only as it relates to the letters
22 of reprimand and defamation.

23

24 **2. Motion for leave to file another Amended Complaint**

25 Plaintiffs move for leave to amend the first amended complaint to add a claim of defamation
26 against San Francisco Mayor Gavin Newsom, and to add a seventh cause of action under 42 U.S.C. §
27 1983 against Fong and the City for alleged denial of plaintiffs' due process rights in connection with
28 plaintiffs' suspensions. Defendants oppose both amendments to the complaint, both on timeliness and

1 futility grounds.

2 Federal Rule of Civil Procedure 15(a) permits a party to amend its pleading “only by leave of
3 court or by written consent of the adverse party; and leave shall be freely given when justice so
4 requires.” Fed. R. Civ. Pro. 15(a). Leave to amend should be granted “with extreme liberality,”
5 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003), so long as factors “such
6 as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure
7 deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the
8 amendment, [or] futility of amendment” are not present, *id.* at 1052 (quoting *Forman v. Davis*, 371 U.S.
9 178, 182 (1962)). In addition, “the district court’s discretion to deny leave to amend is particularly
10 broad where plaintiff has previously amended the complaint.” *Allen v. City of Beverly Hills*, 911 F.2d
11 367, 373 (9th Cir. 1990) (internal quotation marks omitted).

12 Defendants assert that plaintiffs unduly delayed their attempt to amend their complaint to add
13 a defamation claim against Mayor Newsom. The Court agrees. The events at issue in this amendment
14 occurred in December 2005 and January 2006. Plaintiffs filed their complaint in August 2006. They
15 then amended their complaint in February 2007 but did not seek to add the amendments at issue here.
16 Plaintiffs did not seek leave to add Mayor Newsom as a defendant until June 2007. Plaintiffs have made
17 no attempt to justify this delay. They do not, and cannot, claim that they were unaware of the facts at
18 issue, and have given no explanation why they did not include the claim against Mayor Newsom in
19 their original complaint or why they failed to include this amendment when they last amended their
20 complaint in February 2007. *See Allen*, 911 F.2d at 373.

21 Defendants also argue that the amendment would be futile, because Mayor Newsom is clothed
22 with the same statutory immunities as is Chief Fong. The Court agrees that at least Government Code
23 §§ 820.2 and 8821.6 would apply to the defamation claim against Mayor Newsom, making this
24 amendment futile.²

25 The Court therefore DENIES plaintiffs’ motion for leave to amend the First Amended Complaint

26
27 ²There are also indications that the additional defamation claim may be intended solely to
28 embarrass Mayor Newsom, and thus plaintiffs’ motion for leave to amend may not have been made
entirely in good faith. *See Eminence Capital*, 316 F.3d at 1052. Given the disposition of this motion
on timeliness and futility grounds, the Court need not make a finding on this question at this time.

1 to add a claim of defamation against Mayor Newsom.

2 Plaintiffs also seek leave to amend their complaint to add a seventh cause of action for a
3 violation of their due process rights under 42 U.S.C. § 1983, presumably in connection with their
4 temporary suspensions in December 2005. Defendants argue persuasively that plaintiffs' motion for
5 leave to amend is futile because plaintiffs may have received all the process they were due under
6 California law, *see Civil Serv. Ass'n v. City and County of San Francisco*, 22 Cal. 3d 552, 562-64
7 (1978), but the question of futility is less clear under federal law. Plaintiffs have not explained,
8 however, what events form the factual basis of their § 1983 claim, including how the suspensions
9 occurred, what notice plaintiffs received, and what process was provided. Accordingly, the Court
10 DENIES the current leave to amend without prejudice to a further request, based on a fuller statement
11 of the facts related to the due process claim. **Any further motion must be filed no later than October**
12 **6, 2007.**

13

14 **3. Request for judicial notice**

15 Defendants ask the Court to take judicial notice of portions of the San Francisco City Charter
16 and of a recent decision by the California Court of Appeal in the case of *Cohen v. City and County of*
17 *San Francisco*. The Court GRANTS defendants' request. Plaintiffs also ask the Court to take judicial
18 notice of the same decision. The Court DENIES plaintiffs' request as moot.

19

20 **4. Further case management conference**

21 A further case management conference is scheduled for **Thursday, September 27, 2007 at**
22 **4:00 p.m.**

23

24

CONCLUSION

25 For the foregoing reasons and for good cause shown, the Court hereby GRANTS defendants'
26 motion for judgment on the pleadings with regard to the third cause of action against Fong as it relates
27 to the letters of reprimand, and DENIES defendants' motion as it relates to changes to the employment
28 conditions of certain plaintiffs (Docket # 15). The Court GRANTS defendants' motion for judgment

1 on the pleadings with regard to the fourth cause of action against Fong (Docket # 15). The Court
2 GRANTS defendants' motion for judgment on the pleadings with regard to the fifth cause of action
3 against Fong and the City (Docket # 15). The Court GRANTS defendants' motion for judgment on the
4 pleadings with regard to the sixth cause of action against Fong and the City, as it relates to the letters
5 of reprimand and defamation, and DENIES defendants' motion as it relates to any other underlying
6 claims (Docket # 15).

7 With respect to plaintiffs' motion for leave to amend their complaint, the Court DENIES
8 plaintiffs' motion to add a defamation claim against Mayor Newsom and DENIES without prejudice
9 plaintiffs' motion to add a seventh cause of action against the City and Fong under 42 U.S.C. § 1983
10 (Docket # 27). The Court also GRANTS defendants' request for judicial notice (Docket # 15) and
11 DENIES as moot plaintiffs' request for judicial notice (Docket # 39).

12

13 **IT IS SO ORDERED.**

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15 Dated: September 25, 2007

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Susan Illston
SUSAN ILLSTON
United States District Judge